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IN THE

Supreme Court of the United States

October Term, 1962

No. 116

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

v.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

MOTION BY APPELLEE TO AFFIRM UNDER RULE 16

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1077

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

v.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

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Preliminary Statement

Now for the second time the defendants-appellants, New York State Liquor Authority, are here. (370 U. S. 713; June 25, 1962.)

For three years the Liquor Authority has pursued its purpose to *eliminate* this plaintiff-appellee's business not-

withstanding that that business is avowedly and continuously sanctioned, supervised, inspected, controlled and used by the United States Government in implementation of its policy and regulations for foreign commerce, and notwithstanding that the wines and liquors "merely pass through New York on their way to their foreign destination" (Opinion below, Jurisdictional Statement, pp. 38, 42).

This unremitting purpose to eliminate and the multiplicity of the Authority's arguments for its achievement led to the four erroneous and conflicting decisions which this Court in its 1962 decision enumerated and reversed.

Thereupon, and in strict accord with this Court's expressed views, this case was finally tried by a district court of three judges. With a carefully rationalized and unanimous opinion (J. S., pp. 23, *et seq.*) the court enjoined the Liquor Authority from further attempting to apply the state law to veto and terminate the plaintiff's fulfillment of its federal sanction for foreign commerce.

The plaintiff-appellee now moves for summary affirmance on the following grounds:

I

The Grounds of This Motion

(1) Manifestly the two "questions presented" in the Jurisdictional Statement (pp. 2, 3) are so unsubstantial as not to need further argument. Nor do they state the determinative consideration in the case.

(2) Moreover, each was fully briefed, argued and implicitly determined when the case was here in 1962. (370 U. S. 713.)

II

The determinative consideration is a simple one of law.

It was thus stated by the court below (J. S., p. 42):

> "The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do."

The Authority's position, following the State Attorney General's opinion of June 30, 1960, has been and is that, under the New York Alcoholic Beverage Control Law, the plaintiff's "business was illegal as unlicensed and unlicensable" and hence, so the Authority claims, to be eliminated by it (J. S., p. 24).

That opinion of the State Attorney General (former "Transcript," p. 21a) forced this suit and fixed the determinative issue therein by its holding that the plaintiff's business (p. 24a)

> "may not be conducted in this State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license."

This basic position, which, if sound, necessarily predicates that the complaint fails to state a case, was promptly implemented by the Liquor Authority at the very outset of the case by a formal motion to dismiss the complaint because "it fails to state a cause of action" (former Transcript, p. 42a). Simultaneously, the Liquor Authority also took effective measures to strangle the plaintiff's business (J. S., p. 28).

The same basic position was thereafter pressed by the Liquor Authority through the several courts and ultimately was thus put in their 1962 brief here (p. 17):

> "The Attorney General of the State of New York has ruled that the business of the petitioner constitutes 'sales' or 'selling' within the meaning of New York State Alcoholic Beverage Control Law §3(28), that that law contains no provision which would authorize issuance of a license to petitioner to conduct its business, and that under §100(1) of the State Law no person is permitted to sell any alcoholic beverage within the State without a license (1960 Op. Atty. Gen. 8, dated June 30, 1960; 21a-24a)."

Hence this Court correctly pin-pointed the crux of the case in its two opening sentences (370 U. S. 713, 714):

> "The petitioner is in the business of selling bottled wines and liquors for export from the United States and delivery to international airline passengers at their overseas destinations. Upon advice of the Attorney General of New York, the State Liquor Authority

informed the petitioner that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law."

The present motion for summary affirmance predicates that this simple determinative matter of law presents nothing so substantial as to need further argument,—particularly in the light of its full briefing and argument when the case was here before and of the predicates of this Court's decision.

The factual narrative in the opinion below is not put in issue. Even if it had been, it is abundantly supported by the proof.

III

Primary in the two "Questions Presented" (J. S., pp. 2, 3) is the contention that, under the Twenty-first Amendment, the State Liquor Law has paramountcy over the Foreign Commerce Clause in this case, and that, as a consequence, the State Law totally illegalizes the plaintiff's business.

(1) This contention is a pure matter of law.

If sound, the defendants' basic motion to dismiss the complaint because "it fails to state a cause of action" (former Transcript, p. 42a) would be sound.

Hence that contention occupied a major part of the defendants' 1962 brief before this Court (pp. 18-25) wherein the all-embracing heading was that by reason of the Twenty-first Amendment:

> "Regulation of the liquor traffic in the State by the State is paramount to the Federal Government's right

to regulate whether under the constitutional provisions governing commerce, exports and imports, and supremacy, of under statutory and regulatory provisions of a pre-emptive character."

This contention was thereupon elaborated in the defendants' 1962 brief for many pages; and the brief closed with the prayer to this Court (p. 40):

"The petition for a writ of mandamus should be dismissed. The petition for a writ of certiorari should be dismissed, as having been improvidently granted."

(2) Now, for a second time, the identical contention as to the Twenty-first Amendment and total illegalization of the plaintiff's business is again elaborated here, and is again given the primary position in the defendants-appellants' Jurisdictional Statement (pp. 8 *et seq.*).

Moreover, the same argument is again presented in much the same phrasing. The same cases are again cited, and receive like discussion. The conclusion reached is identical, to-wit (J. S., pp. 10, *et seq.*): "the paramount rights of the states to regulate liquor traffic untrammeled by the Commerce Clause," and hence under New York's Liquor Law the plaintiff's business is illegal and to be eliminated.

(3) The defendants base the predicate of this contention on Section 2 of the Twenty-first Amendment, which reads:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

As to "delivery," the Attorney-General's own formal opinion of 1960, which forced this suit, expressly conceded that (former Transcript, p. 22a):

> • • • delivery is not made within the State."

As to "use," there is no claim and no proof that, in the course of the continuous commitment and movement of these bottles in the stream of foreign commerce under United States Customs' supervision and control, from origins without the State to delivery abroad, there is any diversion to "use" within the State.

Indeed, the Liquor Authority's own letter of May 9, 1960, to the State Attorney General (Exh. 2 in the trial below) correctly described the plaintiff's business as

> "traffic in alcoholic beverages having a situs actually or constructively without the State and not intended for use or delivery within the State."

And to the same purport, and after an elaborate and (as far as we can see) uncontradicted description of the plaintiff's business, the opinion below concluded (J. S., pp. 25-27, 37):

> "But we are not here concerned with shipments into New York for 'delivery or use therein.' While the liquor sold by plaintiff passes through New York State and payment for it is made there, it is neither finally delivered nor used until the passenger purchaser arrives at his foreign destination."

And again, to quote the court below (J. S., p. 38):

> "Plaintiff's products merely pass through New York on their way to their foreign destinations. The state cannot completely halt such passage"

And still again, to quote the court below (J. S., p. 42):

> **"From the time the liquor enters the state until its departure, it is constantly subject to supervision and control by officials of the United States Bureau of Customs. Plaintiff's records and inventory are always open to inspection by Customs officials, and such inspections have often taken place. The possibility of theft of liquor from plaintiff's premises, located as they are in the middle of the world's largest international air terminal, is minimal. *In fact, the Liquor Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York.*"**

(4) The appellants' Jurisdictional Statement cites no case applying the Twenty-first Amendment to facts in any way resembling the present.

Such cases as they do cite involve only *domestic* commerce—namely transportation from one state into another state for ultimate delivery and use there contrary to its laws.

On the other hand, an unbroken line of federal and New York decisions, many of which were cited by us to this Court in our 1962 brief, negatives their contention.

In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, the appellant, an importer and distributor of alcoholic beverages, having been denied by the Secretary of the Treasury the right to import its product into the United States, sued for a declaratory judgment that the Federal Alcohol Administration Act was unconstitutional because of the Twenty-first Amendment. This Court held to the contrary, saying (pp. 172-3):

> "Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention."

In *C. J. Tower & Sons* v. *United States*, 135 F. Supp. 874, the United States Customs Court, Third Division, held that the holding of the courts, after ratification of the Twenty-first Amendment, that violations of the National Prohibition Act could no longer be prosecuted, was inapplicable to "a statute enacted under the federal power to regulate foreign commerce." The Court said (p. 881):

> "Said 21st amendment did not destroy the power of Congress to regulate foreign commerce, and, irrespective of that amendment, Congress retains its constitutional right to impose conditions upon the importation of intoxicating liquor into the United States."

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, this Court held that, notwithstanding the Twenty-first Amendment, California could not require a license for the sale of imported beer in a national park which was in the State but under the control of the Federal Government, notwithstanding that the beer had been purchased outside of California and had been transported through it to the Park. This Court said (pp. 536-8):

> "The State makes the point that §2 of the XXI Amendment gives it the right to regulate the importation of intoxicating liquors. * * * The lower court

> was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem * * *, it did not increase its jurisdiction.' With this conclusion, we agree. * * * Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable."

To the same effect is *Yellow Cab Transit Co.* v. *Johnson*, 48 F. Supp. 594; aff'd 137 F. 2d 274; aff'd 321 U. S. 383, where the courts held that, notwithstanding the Twenty-first Amendment, Oklahoma had no control over the shipment of liquor from Illinois to Fort Sill Military Reservation located in Oklahoma.

See also *Nippert* v. *Richmond*, 327 U. S. 416, 425n. 15; and *United States* v. *Gudger*, 249 U. S. 373.

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385, the New York Appellate Division of the Supreme Court overruled the contention of the New York State Liquor Authority that the Twenty-first Amendment put under its jurisdiction Portuguese Brandy imported into the United States and stored in the Free Trade Zone of the Port of New York, located in New York City. The Court said (p. 386):

> "By its terms the Amendment grants power to a State to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery or use within such State. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the Amendment."

This ruling was followed by the same Court in *Rosenblum* v. *Frankel*, 279 App. Div. (1st Dept.) 66, 108 N. Y. S.

2d 6, where the New York Liquor Authority sought jurisdiction over industrial alcohol imported from the Virgin Islands. Said the Court (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State (*During* v. *Valente*, 267 App. Div. 383)."

In *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881, the court held concerning the Twenty-first Amendment and foreign commerce (280 P. 2d at p. 883):

> "The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which, under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned."

In the instant case the wines and liquors were always in their original packages, namely bottles which remained sealed from their origin in the bonded warehouse until the ultimate point of delivery abroad (former Transcript, p. 3a).

In *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, the court held that liquor imported by a California taxpayer from foreign countries and held by it in San Francisco as the original importer and in the original package on tax day, was unlawfully subjected to California's personal property tax laws.

In *State* v. *Board of Review, City of Milwaukee*, 15 Wis. 2d 330, 112 N. W. 2d 914, liquor had been imported into Wisconsin by a state wholesaler but not sold or consigned. It remained in original unopened cases or containers. The Supreme Court of Wisconsin held that, notwithstanding the Twenty-first Amendment, such liquor was exempt from personal property taxes. The court said (p. 917):

> "It is suggested by appellants that the Twenty-first amendment to the United States constitution permits taxation in this case. The argument is made that since that amendment has given the state control over importation of liquor for use and sale solely within the state, the state can tax the liquor. This ignores the fact that under the authorities cited above the protection afforded imported liquor here has not ceased. The liquors are still imports and are protected by the import-export clause. The Twenty-first amendment is not inconsistent with the import-export clause and does not repeal it in so far as intoxicating liquors are concerned. Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332, 280 P. 2d 881."

In *Board of Trustees* v. *United States*, 289 U. S. 48, this Court said (p. 58):

> "The purpose to regulate foreign commerce permeates the entire congressional plan."

(5) In the framework of these facts and settled decisions the insubstantiality of the "Question" now again posed by the appellants as to the Twenty-first Amendment, is manifest.

That Amendment and its pertinency in law, if any, to the present case were fully briefed and argued by both sides before this Court.

Thus, the contention that in law the Twenty-first Amendment gave such supremacy to the State Liquor Law as to enable the defendants to terminate the plaintiff's business altogether, was fully argued in this Court in 1962 as determinative of whether or not the complaint stated a cause of action at all.

This Court held that "assuredly" "the complaint at least formally alleges a basis for equitable relief" (370 U. S. 713, 715).

IV

The other "Question Presented" (J. S., p. 3) is also "so unsubstantial as not to need further argument," and, in addition, it is not a "question on which the decision of the cause depends" (Rule 16).

This other "Question" represents the appellants' contention that, regardless of the Twenty-first Amendment, their application of the State Liquor Law to eliminate the plaintiff's business is not in conflict with the plaintiff's federally sanctioned rights and with the federal program for foreign commerce in wines and liquors.

That contention presents the anomaly and self-contradiction that the application of the State Liquor Law to eliminate what the United States Government sanctions and uses as an implementation in its regulation of foreign commerce, is not "repugnant" to the latter (J. S., pp. 2, 16).

Moreover, the "Question" itself is so worded as erroneously to predicate the plaintiff's federally sanctioned rights as turning exclusively on Section 311 of the Tariff Act of 1930 as amended.

On the contrary, the complaint specifically enumerates in its body and includes in its prayers the following bases of the plaintiff's rights and status as a federally sanctioned implementation of foreign commerce (former Transcript, pp. 1a *et seq.*):

(1) The three Constitutional Clauses; *supra*.

(2) "The Tariff Act of 1930 as amended".

(3) "The Internal Revenue Code", Title 26 U. S. C. §5301. (Former Transcript, p. 3a.)

(4) "The Internal Revenue Code", Title 26 U. S. C. §§5521-2. (Id., p. 3a.)

(5) "The Code of Federal Regulations", Title 19, Ch. 1, Parts 18 and 19. (Id., p. 4a.)

(6) Regulations 26, "Code of Federal Regulations", Part 201, Section 201.467. (Id., p. 3a.)

(7) "Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to". (Id., p. 4a.)

(8) Customs' "approved documents for foreign export" required for all plaintiff's operations. (Id., pp. 3a-5a.)

(9) Approval by the United States Bureau of Customs for "the entire plan of plaintiff's operations and procedures." (Id., p. 6a.)

(10) The ruling of the United States Treasury Department, Bureau of Customs; "that these transactions constitute exports to foreign countries". (Id., p. 6a.)

(11) The bonded warehouses encompassed in the complaint are not only Class 6 but any "United States Customs bonded warehouses". (Id., p. 3a.)

The required Customs' approved forms conditioning all the plaintiff's operations were Exhibits 9 to 14 in the trial below, and are fully described in the opinion below (J. S., pp. 26, 27).

Thus, the plaintiff's operation and procedure have been approved and continuously used since 1958 by the United States Government as part of its regulation of foreign commerce. (Opinion below, J. S., pp. 25, 26.)

In addition, the complaint describes in detail, and the proof shows without contradiction, the manner in which the plaintiff's business is federally sanctioned, supervised and controlled in implementation of the federal program and regulation of foreign commerce in the interest of American travelers, of competitive advantage for the American wine and liquor industry and employment therein, and of the national economy generally.

In no sense can Section 311 of the Tariff Act of 1930 be isolated from the rest of the total federal statutory and regulatory purpose and program as to foreign commerce and the continuing authority given to the Treasury Department and the Customs Bureau to issue directions, orders, rules and regulations, prescribe forms, and adopt and adapt administrative measures for the furtherance of the total objective. (Title 19 U. S. C., §§6, 66, 1308, 1311, 1553-8, 1565, 1623, 1624, 1646a; Title 26 U. S. C., §§5521-3.)

Moreover, Section 311 of the Tariff Act of 1930 is, in and of itself, authority for the express ruling by the United States Treasury Department that the plaintiff's operation constitutes "an exportation of the merchandise within the

meaning of Section 311 of the Tariff Act." (Former Transcript, p. 16a.)

The very Title of the Tariff Act manifests in its comprehensive wording the breadth of its purposes in the exercise of the National Government's exclusive jurisdiction:

> "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

Moreover, the State Liquor Authority has no competence to restrict or usurp the powers and functions of the constituted federal officials in the management and interpretation of their regulations of foreign commerce. (See the U. S. Treasury Department's letter of April 15, 1958, and the Department's continued sanction since. Former Transcript, p. 15a.)

We do not understand that the description of the plaintiff's operations as given in the opinion of the court below (J. S., pp. 25-27) is or could be questioned. Indeed, it is substantially the same as the like description in the Liquor Authority's 1962 brief in this Court (pp. 16, 17).

Hence, here again the "Question Presented" is, even with all its improper emasculation of the complaint, an attempted question of law which is clearly pregnant with self-contradiction, which is manifestly "so unsubstantial as not to need further argument," and which is not the question "on which the decision of the cause depends."

Conclusion

Pursuant to Rule 16, the judgment below should be affirmed, with costs.

Respectfully submitted,

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